Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

Nos. 92-507 and 92-645

In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN R. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL.

STEPHEN R. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, ET AL., PETITIONERS

v.

AMERICAN LAND TITLE ASSOCIATION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Both respondents acknowledge that there is a conflict between the Second Circuit and the D.C. Circuit as to whether Section 92 has been repealed. Br. in Opp. of Independent Insurance Agents of America, Inc., et al.

(IIAA) 8-9; Br. in Opp. of American Land Title Ass'n, et al. (ALTA) 10. That concession is not surprising in light of the Second Circuit's statement that "[c]ontrary to the view of the D.C. Circuit, * * * Congress did not expressly repeal section 92 when it enacted the War Finance Corporation Act." 92-645 Pet. App. 6a. However, the IIAA—but not ALTA—contends that the conflict is not "meaningful" because, in its view, the Second Circuit "need *not* have resolved the issue of Section 92's continued existence in order to conclude that national banks lack the power to act as agents for title insurance companies." Br. in Opp. 8, 9.

The Second Circuit's decision, however, was squarely based on its conclusion that Section 92 "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities." 92-645 Pet. App. 16a. A necessary precondition to that conclusion, the Second Circuit recognized (*id.* at 3a-11a), was its determination that Section 92 remains in existence, since a statute that has been repealed does not "impliedly bar[]" anything. Thus, the Second Circuit's conclusion that Section 92 "remains valid law" (92-645 Pet. App. 11a) was essential to the court's holding. Indeed, as ALTA recognizes (Br. in Opp. 9 n.10), if this Court were to affirm the D.C. Circuit's conclusion that Section 92 is no longer in effect, it would be necessary to vacate the Second Circuit's contrary decision and remand the case to that court of appeals for reconsideration of its holding that national banks in places with more than 5,000 inhabitants may not sell title insurance.

The IIAA also erroneously contends that review is not warranted because a ruling from this Court that Section 92 has been repealed "would not alter the outcome" of the Second Circuit case. Br. in Opp. 10. That contention is

based on the IIAA's assertion that Section 92's enactment shows that Congress believed that the powers granted to national banks by 12 U.S.C. 24 Seventh, the provision that grants national banks "all such incidental powers as shall be necessary to carry on the business of banking," do not include the power to sell products such as title insurance. But the enactment of Section 92 just shows that Congress thought that national banks could not engage in a general insurance agency practice; it does not show that Congress thought that national banks were prohibited from selling products (like title insurance) that the Comptroller of the Currency has determined are "incidental" to "the business of banking."

The IIAA also contends that the conflict surrounding the status of Section 92 is an "arcane" issue that "does not have any significant impact on the banking or insurance industry." Br. in Opp. 12. In fact, however, as the IIAA's submissions show, Section 92 has figured prominently in a number of decisions in the courts of appeals (and this Court) over the years, all of which—until now—have assumed that the statute is still in effect (see IIAA Br. in Opp. 17 (collecting cases)), and the question whether Section 92 is still in effect is currently being litigated before the Fifth and Sixth Circuits (see IIAA 92-645 Amicus Br. 10-12). The volume of past and present litigation involving Section 92 belies the IIAA's claim that the issue of the Section's status is not an issue of sufficient importance to warrant this Court's attention.[1]

[1] On the merits, the IIAA offers two contradictory responses to our argument (92-507 Pet. 12-13) that in the 1916 Act Congress drew a careful distinction between Section 5202 of the Revised Statutes—which referred to the Federal Reserve Act by its full name—and provisions (such as the paragraph preceding Section 92) which referred only to "this Act," and must therefore have

2. Contrary to ALTA's submission, there is also a conflict between the Second Circuit's interpretation of Section 92 and the D.C. Circuit's decision in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164 (1979), cert. denied, 449 U.S. 823 (1980): while the Second Circuit held that Section 92 impliedly bars national banks in places with more than 5,000 inhabitants from selling title insurance, the D.C. Circuit held in *Heimann* that all national banks may sell credit life insurance (another form

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meant to have been included in the Federal Reserve Act. Initially, the IIAA suggests that the phrase "this Act" in the paragraph immediately before Section 92 was an "antecedent reference" to the mention of the "Federal reserve Act" in the paragraph setting out Rev. Stat. § 5202. But the phrase "this Act" was used twice in the 1916 Act *before* the reference in Rev. Stat. § 5202 to the "Federal reserve Act." See 92-507 Pet. App. 83a, 84a. In our view, Congress used "this Act" in the paragraphs preceding and following Rev. Stat. § 5202 to refer to the Federal Reserve Act because those paragraphs were part of the Federal Reserve Act.

The IIAA alternatively suggests that "this Act" was a reference to "the 1916 Act itself." Br. in Opp. 14. But in several places in the 1916 Act the phrase can *only* refer to the Federal Reserve Act. For example, the 1916 Act added a new subsection (§ 11(m)) to the Federal Reserve Act. The new subsection authorized the Federal Reserve Board to permit member banks to deposit in Federal reserve banks all or part of the reserves "now required by *section nineteen of this Act* to be held in their own vaults." 92-507 Pet. App. 83a (emphasis added). Because the 1916 Act was not divided into numbered sections, the reference to "section nineteen of this Act" can only be to Section 19 of the Federal Reserve Act, which in fact sets forth detailed requirements according to which member banks were to hold a certain percentage of their reserves in their own vaults (and Section 19 was not amended in 1916). 38 Stat. 270-271. See also 92-507 Pet. App. 89a (referring to Sections 13 and 14 "of this Act" (see 39 Stat. 752, 754)). Accordingly, the IIAA's position on the merits cannot be reconciled with the text of the 1916 Act.

of insurance that the Comptroller has determined to be "incidental" to "the business of banking"). ALTA asserts (Br. in Opp. 13-16) that there are differences between title insurance and credit life insurance, but those distinctions (see also 92-645 Pet. App. 17a) are irrelevant to the holding ultimately adopted by the Second Circuit. That holding was based on the court's conclusion "that Congress intended this provision [Section 92] to apply to 'any . . . insurance company,' and a title insurance company surely is an insurance company." *Id.* at 16a. So is a credit life insurance company; if Section 92 impliedly bars national banks from selling insurance, it bars them from selling credit life insurance. The Second Circuit seemed to recognize that its holding cannnot be reconciled with *Heimann*, for it stated that "*Heimann*'s persuasiveness is * * * eroded by its scant analysis of section 92 and its failure to discuss the provision's legislative history." 92-645 Pet. App. 17a. In fact, the Second Circuit's analysis is entirely incompatible with the D.C. Circuit's holding in *Heimann*.

Moreover, while the Second Circuit concluded that Section 92 "impliedly bars" national banks located in towns of more than 5,000 inhabitants from selling insurance (92-645 Pet. App. 16a), the D.C. Circuit stated in *Heimann* that Section 92 "does not address" that question (613 F.2d at 1170 n.18). Those "different approach[es]" (92-645 Pet. App. 16a) leave the Office of the Comptroller and the nation's federally chartered banks with directly opposing instructions regarding the meaning of a significant federal banking provision.

ALTA also contends (Br. in Opp. 21-22) that review of the Second Circuit's decision is not warranted because, even if this Court were to agree with the government and conclude that Section 92 is in effect and does not

impliedly bar national banks in places with more than 5,000 inhabitants from selling title insurance, the case would still have to be remanded so that the court of appeals could consider ALTA's objection that the sale of title insurance is not among the "incidental powers" authorized by Section 24 Seventh. However, the fact that ALTA has an additional argument based on its interpretation of Section 24 Seventh (an argument that is contrary to the Comptroller's determination that the sale of title insurance is "incidental" to banking) does not lessen the significance of the conflicts among the courts of appeals as to the status and interpretation of Section 92.[2]

3. In sum, the D.C. Circuit regards Section 92 as repealed and no longer of any force and effect. By contrast, the Second Circuit has held that the provision is not only alive and well, but also impliedly bars national banks in places with more than 5,000 inhabitants from selling products such as title insurance. The confusion among the courts of appeals over the status and interpretation

[2] On the merits, ALTA attempts to reconcile the Second Circuit's interpretation of Section 92 with the language of that provision, which states that the national bank powers granted by that provision are "in addition to" those granted elsewhere, by asserting that the language is "better understood" as a congressional "finding" that national banks in 1916 did not have "the power to engage in the insurance agency business." Br. in Opp. 19 n.22. ALTA's construction does not appear to us to be the "better," or even a reasonable, reading of the statute. In any event, the fact that there may be other possible interpretations of the statute (even "better" ones, in ALTA's view) does not render the Comptroller's interpretation unreasonable. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.11 (1984).

of Section 92 is a matter of considerable importance that warrants this Court's attention.

For the foregoing reasons and those stated in the petitions, the petitions for writs of certiorari in Nos. 92-507 and 92-645 should be granted.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General *

DECEMBER 1992

* The Solicitor General is disqualified in this case.